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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 745

GABRIELE GIORDANO,

Petitioner,

vs.

THE ASBURY PARK AND OCEAN GROVE BANK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY AND BRIEF IN SUPPORT THEREOF.

HERBERT J. KENARIK,
Counsel for Petitioner.

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No. 745

GABRIELE GIORDANO,

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vs.

THE ASBURY PARK AND OCEAN GROVE BANK, BODY CORPORATE; HARRY N. JOHNSON, FORMER SHERIFF OF MONMOUTH COUNTY; THEODORE ROWE, LOUIS STRADA, AND WILLIAM R. O'BRIEN, SHERIFF OF MONMOUTH COUNTY,

Respondents.

PETITION FOR CERTIORARI

May It Please the Court:

The petition of Gabriele Giordano, respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

The petitioner was the owner of a considerable amount of improved real estate in Asbury Park, New Jersey, consisting of six (6) separate parcels containing or having

erected thereon four (4) separate two-story dwellings and a three-car garage. The properties were fully rented and produced about $2200. per year in rents.

The petitioner claimed that the properties were worth at least $35,000. The respondents admitted that the properties were worth at least $15,000. to $16,000. The encumbrances on the various properties did not total more than about $7000. or $8000.

The respondent bank held a judgment against the petitioner in the sum of approximately $350. and sold all the properties of the petitioner, in bulk, to the respondent bank for $100.00.

During part of the period while the proceedings herein were pending, the petitioner alleged that he was confined to a mental institution by the local police under instructions of one of the attorneys for the respondent bank which allegation was never denied.

The petitioner filed a bill of complaint in the Court of Chancery of New Jersey to set aside the Sheriff's Sale. The Chancellor filed an opinion (R. 96), in which he held that the sale price was unconscionable, but by reason of the petitioner's delay, precluded him from any relief and dismissed the bill. The petitioner thereupon appealed from the decree to the Court of Errors and Appeals, the highest Appellate Court in New Jersey, which affirmed the decree below by an opinion reported in 135 N. J. Equity, page 511, decided October 16th, 1944.

No remittitur or decree was entered upon that opinion by the respondents until October 16th, 1945, at which time, a remittitur was entered which affirmed the original decree and also denied a petition for reargument which was filed on September 28th, 1945 (R. 140).

At the trial of the main bill of complaint in the Court of Chancery, the petitioner testified to an oral opinion by Chancellor Walker to one of the solicitors for the re-

spondents, advising him not to sell all the property, but only a small parcel large enough to satisfy the judgment (R. 56, 57).

A petition was filed with the Chancellor applying for a rehearing, reargument and for relief on the ground that petitioner's properties should not have been sold in bulk but should have been sold only in parcels, and only so much thereof sold as was necessary in order to satisfy the execution should have been sold and that the failure to do so deprived the petitioner of his properties without due process of law (R. 133).

That Court considered and decided adversely to the petitioner the contention that the petitioner's properties should not have been sold in bulk but should have been sold only in parcels and only so much thereof as was necessary in order to satisfy the execution, thus denying to petitioner the due process of law guaranteed by the 14th Amendment of the Federal Constitution.

The claim of a constitutional right to have his properties sold only in parcels and not in bulk and only to have so much thereof sold as would satisfy the execution was raised before the Court of Errors and Appeals in the petition for rehearing, reargument and for relief, which was filed before the remittitur was entered (R. 119).

This point was therefore raised by the petitioner at the original trial (R. 56, 57); on the application for reargument before the Court of Chancery (R. 133) and on the application for rehearing, reargument and for relief in the Court of Errors and Appeals (R. 119).

B

Reasons Relied Upon for the Allowance of the Writ

1. The New Jersey Court of Errors and Appeals has decided federal questions of substance in a way probably

not in accord with applicable decisions of this Court and has decided those questions in deprivation of petitioner's constitutional rights as follows:

(a) It has decided as against the claim of constitutional right under the Fourteenth Amendment that the petitioner was accorded due process within the meaning of the Fourteenth Amendment.

(b) It has decided as against a claim of constitutional right under the Fourteenth Amendment that a sale, in bulk, of several parcels of property having a value far in excess of the amount of the judgment, can be sold, in bulk, rather than in parcels and that more than sufficient to pay that judgment can be thus sold in the absence of any show of evidence on the reason or necessity therefor.

C

Prayer for Writ

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Errors and Appeals of the State of New Jersey, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket for the May Term of 1944, Between Gabriele Giordano, Complainant-Appellant, and The Asbury Park and Ocean Grove Bank, Body Corporate, Harry N. Johnson, former Sheriff of Monmouth County, Theodore Rowe, Louis Strada and William R. O'Brien, Sheriff of Monmouth County, Defendants-Appellees; that said decree of said Court of Errors and Appeals be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this

Honorable Court may seem just and proper; and your petitioner will ever pray.

All of which is respectfully submitted this 11th day of January, 1946.

GABRIELE GIORDANO,
By HERBERT J. KENARIK,
Attorney.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 745

GABRIELE GIORDANO,

Petitioner,

vs.

THE ASBURY PARK AND OCEAN GROVE BANK, Body Corporate; HARRY N. JOHNSON, Former Sheriff of Monmouth County; THEODORE ROWE, LOUIS STRADA, and WILLIAM R. O'BRIEN, Sheriff of Monmouth County,

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Courts Below

The opinion of the trial court will be found reported in 9 N. J. Misc. Reports page 1008. It appears in the record R. (pg. 96).

The opinion of the Court of Errors and Appeals is reported in 135 N. J. Equity page 511 and appears in the record at page 117.

The opinion of the Court of Errors and Appeals denying the motion for reargument is not officially reported and it appears in the record at page 140.

II

Jurisdiction

1. The jurisdiction of the Supreme Court of the United States is invoked under Section 237(b) of the Judicial Code, and under Rule 38, paragraph 5(a) of the Court.

2. The day of the entry of the remittitur and decree of affirmance is October 16th, 1945.

3. The nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237(b) of the Judicial Code for the following reasons:

(a) The claim of federal constitutional rights in relation to the petitioner's rights to have the property sold in parcels and not in bulk was raised at the original trial (R. 56, 57); it was raised on an application for a rehearing before the trial court (R. 133); it was raised before the New Jersey Court of Errors and Appeals on the application for rehearing and reargument (R. 119); the claims were specifically presented to and denied by the trial court and by the New Jersey Court of Errors and Appeals.

4. The cases believed to sustain the jurisdiction are as follows:

Ballentyne v. *Smith*, 205 U. S. 285;
Graffam v. *Burgess*, 117 U. S. 180;

where the Court held that if the inadequacy of price for real property purchased at an execution sale be so gross as

to shock the conscience or, if in addition to gross inadequacy the purchaser has been guilty of unfairness or has taken under advantage or if more has been sold than necessary to satisfy the execution, the sale will be regarded as fraudulent and void and the party injured will be permitted to redeem the property sold.

Warner v. *Grayson,* 200 U. S. 257,

which establishes that separate parcels should not be sold in their entirety unless the interest of encumbrancers require it.

Slater v. *Maxwell,* 6 Wall. (U. S.) 268,

where the Court held that the sale of an entire tract in one body would vitiate the proceeding if bids could have been obtained upon an offer of part of the property.

III

Statement of the Case

An adequate statement of the case is presented under the heading "A" of the petition for writ of certiorari. In the interest of brevity, the statement is not repeated here.

IV

Specification of Errors

The trial Court and the Court of Errors and Appeals erred in finding and holding that despite the gross inadequacy of price, the sale by the Sheriff under execution of all of the petitioner's property in bulk rather than in parcels and his failure to limit the sale only to so much as would be adequate to satisfy the small judgment, was not in contravention of the provisions of the Fourteenth Amendment and did not deprive the petitioner of his property without due process of law.

V

ARGUMENT

Summary of Argument

Point A. The petitioner was deprived of his property without due process and his rights under the Fourteenth Amendment were contravened by the refusal of the Court to set aside the sale under execution on the ground that the same was invalid due to the conduct of the respondents in selling all of petitioner's separate parcels of property in bulk rather than in parcels, and in failing to sell only so much thereof as would be necessary to satisfy the judgment, coupled with the gross inadequacy of price.

Point A

There seems to be no question and the Court below was satisfied that the execution sale was unconscionable and should have been set aside except for the petitioner's alleged laches (R. 102). The Court was in error in feeling that any laches, if it existed, prevented the Court from giving the petitioner relief. *Burke* v. *Gunther*, 128 N. J. Equity 574, establishes that mere lapse of time does not constitute laches. There must be something more, either loss of evidence or a change of position or that because of the lapse of time, it cannot feel confident of its ability to ascertain the truth.

There is nothing in the record except the fact that there was a delay in time. There was no proof of a change in position on the part of the respondents nor any proof of a loss of evidence by reason of the delay. *Lundy* v. *Seymour*, 55 N. J. Equity, 1 establishes also that mere lapse of time will not constitute laches. The Court further held

> "In this case the complainant's delay in seeking his remedy in equity has been more than fourteen years.

When his tenant wrote him that a man named Seymour owned the property, and that he would not pay the complainant more rent, if he was in the possession of his mental faculties, he was put upon an inquiry which would have disclosed the necessity of this suit. It appears that he was then in Pennsylvania suffering from some mental and physical affliction. What that affliction was does not appear. Whether it did, in fact, incapacitate him, is not shown, save by the opinions of affiants which are not supported by statements of facts. How long the affliction lasted is left obscure. If he possessed capacity to care for his property, his inattention to it has very much the appearance of abandonment of it and a waiver of his remedy in equity. Indeed, upon the case, as he presents it, if it had been made to appear that the delay has been prejudicial to the defendant through change in position loss of proof or other cause, or has obscured the path of the court so as to leave it in uncertainty, I would hesitate to act. But I do not perceive that the delay has caused any substantial detriment."

In this case now before your Honors, the petitioner was confined to a mental institution, a fact which was known to the respondent's attorney.

From earliest times it has been held that properties being sold under execution must be sold in separate parcels if plainly divisible. This has been established by any number of cases in this Court.

Slater v. *Maxwell*, 6 Wall. 268;
Warner v. *Grayson*, 200 U. S. 257;
Ballentyne v. *Smith*, 205 U. S. 285;
Graffam v. *Burgess*, 117 U. S. 180.

This is likewise the law of the State of New Jersey. *Merwin* v. *Smith*, 2 N. J. Equity 195; *Lundy* v. *Seymour*, 55 N. J. Equity 1.

In the case of *Merwin* v. *Smith*, the Court pointed out that the Sheriff had sold, under execution, a considerable

amount of the judgment debtor's properties claimed to be worth $25,000.00 and subject to a mortgage of only $6,000.00. The sale was under an execution for $690.00. The Court said:

> "* * * this wholesale method of disposing of a defendant's property can never be justified upon any other ground than as being the best mode for making it bring the most money. A property may, indeed, be so circumstanced, one part so dependent on the other, as to require a sale in large parcels; *but the general rule is, that it must be sold in different parcels if plainly divisible.* Woods v. Monell, 1 John Ch. Rep. 505; Tiernan v. Wilson, 6 Ibid, 413.
>
> "*A defendant in execution has his rights, and his property is not to be sold under disadvantageous circumstances.* In this case, the result of the sale would seem to have been peculiarly unfortunate; for the charge in the bill is plainly made, that the purchaser has boasted that the wood on the premises, for the whole of which he gave, including the incumbrances, less than seven thousand dollars, is worth sixteen thousand dollars."

I respectfully point out the similarity that in this case the defendant bank admitted that it had purchased at the sale at least $8,000.00 in equities in these properties and had paid only $100.00 for it. In fact its total judgment claim was only about $400.00

In the case of *Lundy* v. *Seymour*, 55 N. J. Eq. page 1, the Court set aside and declared improper a sale under a judgment execution where the Sheriff levied upon and sold four (4) separate and distinct parcels of land in bulk. The Court pointed out.

> "The sheriff's conduct, in which the plaintiff's attorney appears to have, at least, acquiesced, remaining as it does unexplained, exhibits an abuse of the discretion which the law vested in him to determine the

quantity of land necessary to be sold, and whether it should be sold in bulk or in parcels. *The land being in detached, independent parcels, each of considerable value, clearly should have been sold in parcels.* Johnson v. Garrett, 1 C. E. Gr. 31; Schilling v. Lintner, 16 Stew. Eq. 444; Holmes v. Steele, 1 Stew Eq. 173; Tiernan v. Wilson, 6 Johns Ch. 411. In the last cited case Chancellor Kent said:

"The very circumstances of advertising and selling the whole supposed interest of the plaintiff in both lots together and for so small a demand, was calculated to excite distrust as to the title and to destroy the value of the sale. It was a perversion of the spirit and policy of the power with which the sheriff was entrusted."

The Court goes on to say

"Here the inadequacy of the price bid for the land, shocking as it does the conscience, in itself is strong evidence of fraud, and when it is coupled with the now apparent abuse of the sheriff's discretion, the complainant's lack of knowledge of the sale, and his subsequent mental enfeeblement, and the subsequent devolution of the title to the property sold upon the wife of the attorney who participated in the unjust sale, it becomes, I think, convincing evidence of fraud. 2 Pom. Eq. Jur. Sec. 927; 1 Story Eq. Jur. 256; Wintermute v. Snyder, 2 Gr. Ch. 489, 496; Gifford v. Thorn, 1 Stock, 702-740; Weber v. Weitling, 3 C. E. Gr. 441; Kloepping v. Stellmacher, 6 C. E. Gr. 328; Phillips v. Pullen, 18 Stew. Eq. 836."

In *Schilling* v. *Lintner,* 43 N. J. Eq. 444, the Court set aside a sale, holding the premises should have been sold in parcels. The Court said:

"Besides this important question, another is presented which raises an insurmountable difficulty in the way of confirming this report. The petitioner insists that it was the duty of the sheriff to sell the land in parcels. The force of this is not resisted by the counsel

of the purchaser. I must conclude, from what was admitted before me, that this was a serious mistake upon the part of the officer, and that, under the practice and the decisions heretofore rendered, upon this ground, if no other, the sale cannot be confirmed. Coxe v. Halsted, 1 Gr. Ch. 311; Merwin v. Smith, 1 Gr. Ch. 182; Johnson v. Garrett, 1 C. E. Gr. 31."

The Court has pointed out that in seeking to set aside a sale of the sheriff, proof of actual fraud is not essential. *Cummins* v. *Little,* 16 N. J. Eq. pg. 48. The Court in this case at page 56 says:

"I accept it as a sound and clear principle, that if a sheriff abuses, to the detriment of subsequent encumbrances or of the defendant in execution, the discretion vested in him by law to make sale under execution, a court of equity will grant relief, although there has been a formal compliance in the conduct of the sale with all the requirements of the statute. *It is not necessary that there should be actual fraud committed or meditated.* The abuse of discretion in the execution of the trust is a constructive fraud, against which equity will relieve.

In arriving at this conclusion, no fraud or improper motive is designed to be imputed to the sheriff. The evidence does not warrant it. The fair presumption, I think, from the evidence is, that the sheriff had no idea of the real value of the interest that he was selling, of the circumstances which surrounded the transaction, or of the effect of the sale upon the rights of the parties interested. Otherwise, it is scarcely credible that, as a right minded man and upright public officer, he would have struck off the property as he did. Nor has any fraudulent motive thus far been imputed to the purchaser. If he attended the sale as he alleges, and purchased the property in good faith, without fraud or dissimulation, for the purpose of protecting his rights, it would not have justified the conduct of the sheriff or sanctioned the validity of the sale."

Conclusion

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that rights under the Constitution of the United States should be preserved and accordingly that a writ of certiorari should be granted and this Court should review and reverse the decision of the Court of Errors and Appeals of the State of New Jersey.

Respectfully submitted,

HERBERT J. KENDRIK,
Attorney for Petitioner.

(2385)

Supreme Court of the United States

October Term, 1945.

No. 745.

GABRIELLE GIORDANO,

Petitioner,

vs.

THE ASBURY PARK AND OCEAN GROVE BANK, et als.,

Respondents.

On Petition for Certiorari.

Brief of Respondents

THEODORE D. PARSONS,
Attorney for Respondents.

I. F. Huntzinger Co., *Appellate Printers*, Camden, N. J.

SUBJECT INDEX

TABLE OF CASES CITED

SUPREME COURT OF THE UNITED STATES.

October Term, 1945.

No. 745.

GABRIELLE GIORDANO,

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vs.

THE ASBURY PARK AND OCEAN GROVE BANK, Body Corporate; HARRY N. JOHNSON, Former Sheriff of Monmouth County; THEODORE ROWE; LOUIS STRADA, and WILLIAM R. O'BRIEN, Sheriff of Monmouth County,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The respondents, THE ASBURY PARK AND OCEAN GROVE BANK, body corporate, HARRY N. JOHNSON, Former Sheriff of Monmouth County, THEODORE ROWE, LOUIS STRADA and WILLIAM R. O'BRIEN, Sheriff of Monmouth County, respectfully show:

STATEMENT.

Respondents, in presenting their brief to this Honorable Court in opposition to the application of the petitioner, Gabrielle Giordano, for a writ of certiorari, are handicapped in a proper presentation because neither the petitioner nor his counsel have served upon the respondents, or their counsel, a copy of the printed record.

The record in the court below consisted of a State of Case, together with a Stipulated Supplemental State of Case and Motion Record. This Stipulated Supplemental State of Case and Motion Record has not been printed in the record now before this Court according to information furnished respondents by counsel for the petitioner.

This Stipulated Supplemental State of Case and Motion Record, a copy of which is submitted with this brief, shows the closing of the respondent bank by order of the Commissioner of Banking and Insurance on December 24th, 1931, and its remaining closed until May 1st, 1933, when it resumed business upon conditions approved by the Commissioner of Banking and Insurance of the State of New Jersey (See Stipulated Supplemental State of Case, page 2, paragraph 1).

All advertisements required by Statute, Pamphlet Laws of New Jersey 1931, Chapter 256, were published (See Exhibits B and C annexed to Stipulated Supplemental

State of Case, page 5, page 7). Under this Statute prescribing such publication, all depositors and other creditors of the Bank were determined and distribution made accordingly.

On May 1st, 1933, the Bank re-opened under a plan approved by the Commissioner of Banking and Insurance of the State of New Jersey, and under this plan 30,000 shares of preferred stock were issued, delivered and held in trust for all depositors and other creditors who had duly proved their claims.

The Court of Errors and Appeals of the State of New Jersey held in the case of *Newman vs. Asbury Park and Ocean Grove Bank*, 120 N. J. Law, 122, that a creditor of the Asbury Park and Ocean Grove Bank existing prior to re-opening could not proceed against the Bank in its status as altered by the re-organization plan sanctioned, by Statute and approved by the Commissioner.

On November 21st, 1935, all preferred stock was retired and common stock was in lieu thereof issued and actually delivered "to all those for whose benefit said preferred stock had been issued" (See Stipulated Supplemental State of Case, page 3). This retirement of preferred stock and the issuance of common stock was made pursuant to an order of the Court of Chancery on proceedings had on notice. These proceedings are set forth in full in the Stipulated Supplemental State of Case and designated as Exhibit D, page 9.

When the Bank re-opened on May 1st, 1933, all prior creditors and depositors had been determined on duly published notice. These individuals, under the approved reopening program, participated in all assets of the Bank in the exact proportion as their respective claims bore to the original total liability of the Bank. The common stock issued in 1935 was delivered by the aid of fractional shares

on precisely the same ratio as was also the preferred stock of the liquidating corporation (See Exhibit D, Stipulated Supplemental State of Case).

Because of the failure of the petitioner to present the full State of Case to this Court, counsel for respondents felt it necessary to preface its brief by the aforegoing statement.

STATEMENT OF CASE.

In 1921, the Asbury Park and Ocean Grove Bank discounted for Giordano, the petitioner herein, a $350.00 note. Giordano failed to pay the note and judgment was entered in 1922. In satisfaction of this judgment Giordano gave a new note. This note was secured by a mortgage covering the premises. The Bank did not record this mortgage.

When Giordano discovered that the Bank had not recorded the mortgage, he encumbered the property with several other mortgages, one of which was to the Searle Memorial Home (R. page 38). When this second note remained unpaid for three years the Bank took judgment on February 24th, 1925.

Giordano appealed from the judgment, claiming, among other things, that both the note and mortgage were procured by duress. His application to list the appeal was dismissed by the New Jersey Supreme Court (*Giordano v. Asbury Park and Ocean Grove Bank*, 3 N. J. Misc. 555 (1925)).

Another gesture concurrent with that appeal was Giordano's launching an action against the Bank for conspiracy and slander.

For lack of prosecution a Rule to Show Cause Why the Judgment of Nonsuit should not be opened was discharged by the New Jersey Supreme Court. Giordano's appeal to the New Jersey Court of Errors and Appeals was dismissed (*Giordano v. Asbury Park and Ocean Grove Bank,* 103 N. J. Law, 194 (1926)).

Two years after entry of judgment, Giordano's premises were sold under execution. The Asbury Park and Ocean Grove Bank, making a nominal bid of $100.00, bought in the property, which consisted of a plot of ground in Asbury Park, 117 feet by 122 feet, upon which were erected several frame houses. The buildings were in gross disrepair. The land had been sold for taxes in 1925, and taxes for 1926 and 1927 were unpaid.

By this time Giordano, in addition to his discovering that the Bank's mortgage was unrecorded and his finding a mortgage lender, the Searle Memorial Home, found another lender to whom mortgages were given aggregating $4,000.00 (See R. page 64).

This execution sale by the Bank was followed by a foreclosure of the first mortgage on the premises in question held by the Searle Memorial Home. The Bank's execution sale took place on May 31st, 1927 (See R. page 72) after being adjourned from week to week for nine weeks from March 28th, 1927 (See R. pages 73 and 74).

The execution sale by the Sheriff under the foreclosure of the first mortgage held by the Searle Memorial Home took place in September of 1927 (See R. page 75). The respondent, The Asbury Park and Ocean Grove Bank, purchased the premises in question at this foreclosure sale.

Including the amount bid at the foreclosure sale resulting in the delivery to it of a Sheriff's deed, the Bank in satisfaction of all liens and charges actually paid out in cash the sum of $11,091.07 (See R. pages 78 and 79) and lost the

entire amount of its judgment. A year later the Bank sold the premises to the respondents, Strada and Rowe, for $14,000.00 (R. page 91). The new purchasers spent for repairs $3,251.29 (R. page 92).

After waiting three years the petitioner, Giordano, filed a bill in the Court of Chancery of New Jersey on April 24th, 1930 (R. page 1) to set aside the sale on the ground that the price was inadequate and there was a conspiracy to defraud. On final hearing, Vice Chancellor Berry of the New Jersey Court of Chancery dismissed the bill (9 N. J. Misc. 1008 (R. pages 96-103)).

On October 7th, 1931, Giordano filed a Notice of Appeal from this decision of the Court of Chancery of New Jersey to the Court of Errors and Appeals of the State of New Jersey (R. page 106). This Notice of Appeal was never served upon the respondents herein, or their attorneys (R. page 106).

For ten years Giordano remained silent, and then on October 27th, 1941, he filed his Petition of Appeal (R. page 107). This appeal was submitted to the New Jersey Court of Errors and Appeals in the May Term, 1944, and the Court, at that time, considered both the respondents' motion to dismiss the appeal for lack of diligence on behalf of Giordano and also considered the merits of the case. The New Jersey Court of Errors and Appeals in affirming the decree below held "there was no diligence in the prosecution of the appeal and it should have been dismissed. Since we have examined the case and find no merit in the appeal, the decree will be affirmed with costs to the respondents." (*Giordano v. Asbury Park and Ocean Grove Bank*, 135 N. J. Eq. 511).

Giordano then made an application to the New Jersey Court of Errors and Appeals in the form of a petition for Re-hearing and Re-argument, at which time Giordano then

raised, for the first time, his contention that his constitutional rights were violated in that it was his right to have the property sold in parcels and not in bulk. Nowhere in the record of petitioner does it appear that the premises in question consisted of separate parcels, but rather that there were several frame houses erected on a plot, 117 feet by 122 feet.

The petitioner, in his brief, makes many loose statements, none of which are supported by fact or proof. One of these is that the petitioner was confined to an insane asylum under instructions from one of the attorneys for the respondent bank, and petitioner contends that this allegation was not denied. There was no proof whatsoever offered for this contention, nor did it appear in the original record, and it was not until 1944. when the petitioner in an application to the New Jersey Court of Errors and Appeals for permission to appeal to this Court, that this contention of Giordano of his insanity was raised for the first time, and in view of any absence of proof therein contained, it was not deemed necessary to have answered it.

ARGUMENT.

Point I.

Whatever interest that the petitioner, Giordano, had in the premises in question he encumbered by a mortgage to the Searle Memorial Home; whatever interest the respondent, The Asbury Park and Ocean Grove Bank, had in those premises by virtue of its execution sale under its judgment;

and whatever right Giordano had in such interest of the Bank, were all cut off or rendered academic by the foreclosure sale.

That the Bank was incidentally the highest foreclosure bidder should no more expose it or the sale to attack than if the property had been knocked down to a stranger.

The execution sale which the petitioner, Giordano, wants to set aside and by which he now claims he was deprived of his property without due process of law, was by operation of law, set aside by the Searle Memorial Home foreclosure seventeen years ago. Neither the Sheriff's deed, nor the foreclosure sale productive of it, is attacked, nor are the parties to that foreclosure made parties here.

Point II.

The petitioner, Giordano, in citing the New Jersey case of *Burke v. Gunther,* 128 N. J. Eq. 574, to the effect that mere lack of time does not constitute laches, and in an attempt to explain his own delay, does not come under the provision in the rule laid down in that and other cases cited. Giordano in this connection alleges that he was confined to a mental institution, but there is no such proof of this allegation.

The point in question goes a whole lot further than his alleged contention that there was a gross inadequacy of price bid for the land at the Sheriff's sale under the Bank's foreclosure. Disregarding for a moment the fact that the respondent bank herein obtained perfect title to the premises by the Searle foreclosure sale, we have a complete change of position by the respondent bank. An entirely new Board of Directors and Officers took over in the new

Asbury Park and Ocean Grove Bank when it was re-opened after the Bank closing.

Giordano failed to file any proof of claim with the Bank as provided for by Statute. The record fails to disclose any Lis Pendens sub judice except petitioner's recital in his Replication (R. page 32) as to a "double Lie Pendents filed on March 1928" when an "original bill of complaint was filed." Giordano's bill to the Court of Chancery, the subject matter herein, was filed April 24th, 1930. (R. page 1).

When the Bank re-opened on May 1st, 1933, all prior creditors and depositors had been determined on duly published notice. These individuals, under the approved re-opening program, participated in all assets of the Bank in the exact proportion as their respective claims bore to the original total liability of the Bank (see Details of Plan, Exhibit D, Stipulated Supplemental State of Case).

The Statutes and all attendant proceedings on notice would appear to make this ratio final and free from re-adjustment, notwithstanding the appearance of some later claim that the total liability base should be enlarged.

Any enlargement, without a like increase in assets, would necessarily take some of the property belonging to these other creditors. They cannot be deprived of their property, at least not without being made parties to litigation, having that deprivation as its ultimate subject matter.

The New Jersey Court of Errors and Appeals in the case of *Newman v. Asbury Park and Ocean Grove Bank,* supra, held this legislation constitutional. Consequently, after thirteen years of unexplained delay, the petitioner seeks to obtain a share in the property of others. These other creditors took it without actual or constructive notice of the alleged rights of the petitioner which his long silence so effectively concealed.

The petitioner now contends that he was deprived of his

property without due process and his rights under the Fourteenth Amendment were contravened, whereas, the fact is that should the petitioner succeed the other creditors of the Bank, who properly filed their claims, would now be deprived of their property without due process, which property they took without any actual or constructive notice of petitioner's alleged rights.

The petitioner in his argument fails to call to this Court's attention the closing of the Bank, its subsequent re-organization, the distribution made to the creditors of the old Bank, and his failure to file any proof of claim against the assets of the old Bank as required by Statute.

The instant problem goes a whole lot further than the petitioner's contention that his property was sold for $350.00. The Bank in satisfaction of all liens and charges, including mortgages and taxes on the premises, paid upwards of $11,000.00 in addition to its judgment, and also obtained a perfect title to the premises in question as the result of its purchase of the said premises at the Searle Memorial Home foreclosure sale, which sale has never been attacked by the petitioner.

The cases cited by the petitioner, both in New Jersey, and in the United States Courts, are not in point because in the instant case there is no proof before the Court of any sale under the Bank's judgment of separate and distinct parcels, but there is ample proof that the long delay of the petitioner created a change in position of the Bank in question.

The petitioner, in his brief on page 10, under Point A, seems to concede that a change of position and a loss of evidence would greatly weaken his present contention but deliberately, or otherwise, he failed to include in his record

submitted to this court the fact of the complete change of position of the respondent, The Asbury Park and Ocean Grove Bank.

CONCLUSION.

The respondents, therefore, respectfully submit that this case is not one wherein this Court should exercise its power to grant a writ of certiorari because (1) whatever rights the petitioner may have had to his property were completely cut off by the Searle Memorial foreclosure sale, which sale has not been attacked by the petitioner and at which sale the respondent, The Asbury Park and Ocean Grove Bank, was the purchaser; (2) because the petitioner failed to file any proof of claim against the respondent bank during its re-organization proceedings, as provided by Statute; (3) because of the petitioner's unexplained delay of thirteen years from the filing of his notice of appeal to the prosecution of same; (4) because of the completely changed position of the respondent bank; and finally because allowing the petitioner to proceed against the assets of the old Bank would take away some of the property belonging to other creditors of that Bank, who properly filed their claims.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney for Respondents.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 745

GABRIELE GIORDANO,

Petitioner,

vs.

THE ASBURY PARK AND OCEAN GROVE BANK, ET ALS.

Respondents.

PETITIONER'S REPLY BRIEF

HERBERT J. KENARIK,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 745

GABRIELE GIORDANO,

Petitioner,

vs.

THE ASBURY PARK AND OCEAN GROVE BANK, BODY CORPORATE; HARRY N. JOHNSON, FORMER SHERIFF OF MONMOUTH COUNTY; THEODORE ROWE; LOUIS STRADA, AND WILLIAM R. O'BRIEN, SHERIFF OF MONMOUTH COUNTY,

Respondents.

PETITIONER'S REPLY BRIEF

At the outset, I respectfully point out it is significant that Nowhere in the Respondent's Brief is any attempt made to justify or uphold htis illegal sale and obviously the respondents themselves, admit its total lack of validity. The main portion of the brief filed by the respondents in this matter has reference to matters not in the record before this Court. The respondents start with the complaint that a portion of the State of Case in the Court of Errors of New Jersey was not included in the present record. As to this, it is respectfully submitted that a praecipe setting forth the parts of the record intended to be printed was served upon the respondents' counsel.

There was no objection raised. Furthermore, this additional material was unimportant and irrelevant to the case. If it had been important and relevant, respondents' counsel could and should have urged that question when the praecipe was served upon him or have followed the procedure set forth in Rule 17 of this Court to correct an alleged diminution of the record. The respondents' brief and main argument refers to matter not in the record before this Court and should not be considered.

The respondents then go on to make the specious claim that they were able to defeat the petitioner's rights in this matter simply because two (2) years after they purchased this property at an execution sale, they contrived to purchase it at a foreclosure sale. Such an artifice certainly cannot serve to defeat the petitioner's equitable claim.

The respondents then contend because the bank was closed and then reopened with a new Board of Directors, the petitioner should be deprived of the right to pursue his property. This claim is obviously without foundation, as is likewise the concern of the respondents for the creditors of the bank. The petitioner has the right to follow his property of which he was unlawfully deprived by an illegal sale.

The alleged claim of laches is adequately met in the petitioner's original brief. The fact that the bank changed Board of Directors has not changed the position of the respondent bank. There is no claim that the property sought to be pursued has suffered any substantial change in position.

Respectfully submitted,

HERBERT J. KENARIK,
Counsel for Petitioner.